INDEX.

	PAGE
Statement	1
Argument	2
I. Wherein This Case is Readily Distinguishable from Certain Other Cases Now Before This Court	2
II. This Proceeding Is Not a Suit Against the United States	3
III. There Exists a Contractual Relation Between the State of New Mexico and the United States Under the School Grant	9
IV. The State Complied with All Terms and Conditions of the Grant in Making Its Lieu Selection	12
V. The School Grant Attaches to the Sections Specified upon Identification Thereof by Survey and to the Indemnity and Lieu Lands upon Identification Thereof by Selection	14
VI. A Perfect Lieu Selection by a State Under its School Grant Has More than all the Attributes of a Final Entry; It is the State's Muniment of Title to the Selected Land and the Muniment of Title of the United States to the Base Land	21
VII. It Is Contrary to the Meaning of the Words "Under the Direction and Subject to the Approval of the Secretary of the Interior" for that Officer to Exercise his Discretion as Distinguished from his Judgment with Respect to Selections	26
VIII. Not one of the Cases Cited in the Appellants' Brief Is in Point or Even of Value Suggestively	34

IX. Acts of the President Under Legislation Relating Exclusively to the Administration of National Forests Do Not Impair the Rights of a State Under Legislation Granting Public Lands for School Purposes . . . 39
X. The Land Department's Ruling that the State Substitute Other and Different Base Land or Suffer Rejection of its Perfect Selection Was an Affront to the Dignity of the State and an Invasion of its Rights under its Grant . . . 43
XI. It Would be to Penalize the State for Delays in the Transaction of Public Business by the Land Department to Hold that the Elimination from the Forest Defeated the Selection . . . 49
XII. Inequitable and Wholly Unwarranted in Law was the Act of the Appellants in Attempting Rejection and Cancellation of the Perfect Selection . . . 52

CONSTITUTIONS.

Constitution of United States, Article 4, Sec. 3 . . . 10
Constitution of New Mexico, Articles 12 and 21 . . . 9

STATUTES.

Act of February 26, 1859, 11 Stat., 385 . . . 31
Act of February 28, 1891, 26 Stat., 796 . . . 17
Act of March 3, 1891, 26 Stat., 1095 . . . 5
Act of August 18, 1894, 28 Stat., 394 . . . 11
Act of June 4, 1897, 30 Stat., 11, 36 . . . 5, 16, 37, 44
Act of June 21, 1898, 30 Stat. 484 . . . 10
Act of June 20, 1910, 36 Stat., 557, 561, 562, 563, 565 . . . 9

R. S., Secs. 2275, 2276 . . . . . 11, 17, 27, 37
Act of Legislature of New Mexico, approved June 14, 1912, Laws of New Mexico, 1912, p. 174, *et. seq.* 13

PROCLAMATIONS

Proclamation by the President, dated April 3, 1916, 39 Stat., 1774 5
Proclamation by the President, dated January 6, 1912, 37 Stat., 1723 9

CASES.

Ballinger *v.* Frost, 216 U. S., 240, 249 7
Beecher *v.* Wetherby, 95 U. S., 517, 524 . . . . . 18, 19
Benson Mining Co. *v.* Alta Mg. Co., 145 U. S., 428, 431–2 52
Best *v.* Polk, 18 Wall., 112–118 19
Bishop of Nesqually *v.* Gibbon, 158 U. S., 155, 167 32
Board of Liquidation *v.* McComb, 92 U. S., 531, 541 8
Boyd *v.* United States, 116 U. S., 616, 635 57
Brown *v.* Hitchcock, 173 U. S., 473, 478 32
Cornelius *v.* Kessel, 128 U. S., 456, 461 7
Cosmos Co. *v.* Gray Eagle Co., 190 U. S., 301, 314, 315 . . . . . 32, 35, 39
Curtner *v.* United States, 149 U. S., 662, 675 19
Daniels *v.* Wagner, 237 U. S., 547, 560, 561 16
Deseret Salt Co. *v.* Tarpey, 142 U. S., 241, 248 19
Dickens Lessee *v.* Mahana, 21 How., 276, 282 19
Fremont *v.* United States, 17 How., 541, 559 19
Gaines *v.* Nicholson, 9 How., 356, 364 18
Garfield *v.* Goldsby, 211 U. S., 249, 261, 262 7
Hamilton R. R. Co. *v.* Smith, 9 Wall., 95, 99 18
Hawley *v.* Diller, 178 U. S., 476, 492 32
Hedrick *v.* Hughes, 15 Wall., 123, 129 19
Irving *v.* S. F. Svgs. Union, 136 U. S., 578, 579 18
Johanson *v.* Washington, 190 U. S., 179, 183, 184 31

Knight *v.* U. S. Land Assn., 142 U. S., 161, 181, 188 . 3
Leavenworth R. Co. *v.* United States, 92 U. S., 733, 740, 741 18
Lessieur *v.* Price, 12 How., 59, 76 19
McCreery *v.* Haskell, 119 U. S., 327, 330, 331 26
Mining Co. *v.* Con. Mining Co., 102 U. S., 167, 171, 172 18
Minnesota *v.* Hitchcock, 185 U. S., 373, 391, 392, 393, 401 10
Noble *v.* Union River Logging Co., 147 U. S., 165, 171, 172, 175 . . . . . 8, 32
Northern Pac. R. Co. *v.* Musser-Sauntry Land Co., 168 U. S., 604, 611 17
Riverside Oil Co. *v.* Hitchcock, 190 U. S., 316, 325 . 32
Rutherford *v.* Green's heirs, 2 Wheat., 194, 204 . . 19
Ryan *v.* Central Pac. R. R. Co., 99 U. S., 382, 386, 388 15
Sinking Fund Cases, 99 U. S., 700, 719 40
Smelting Co. *v.* Kemp, 104 U. S., 640 32
Southern Pac. R. Co. *v.* Bell, 183 U. S., 675, 687 . . 18
Stanley *v.* Schwably, 147 U. S., 508, 518 6
Tubbs *v.* Wilhoit, 138 U. S., 134, 137, 146 18
United States *v.* George, 228 U. S., 14, 21 34
United States *v.* Loughrey, 172 U. S., 206, 210 . . . 19
United States *v.* So. Pac. R. Co., 223 U. S., 565, 570 . 15
Water and Mining Co. *v.* Bugbey, 96 U. S., 165, 167 . 18
Weyerhaeuser *v.* Hoyt, 219 U. S., 380, 387, 388 15, 18, 26
Williams *v.* United States, 138 U. S., 514, 524 . . . 31
Wright *v.* Roseberry, 121 U. S., 488, 496 24

Bludworth *v.* Lake, 33 Calif., 261 19
Brigham City *v.* Rich., 97 Pac., 220 24
Doll *v.* Meador, 16 Calif., 320 19
Groeck *v.* Southern Pac. R. Co., 102 Fed., 34 . . . 31
Hibbard *v.* Slack, 84 Fed., 574 18

Howe *v.* Parker, 190 Fed., 738–737 33
King *v.* Andrews, 111 Fed., 863 32
Leonard *v.* Lennox, 181 Fed., 760–762 33
McKinney *v.* Carson, 99 Pac., 660 23
Saunders *v.* Mining Co., 125 Calif., 159 18
Sherman *v.* Buick, 45 Calif., 669 18
So. Development Co. *v.* Enderson, 200 Fed., 272 24
State *v.* Tanner, 102 N. W., 237 19
United States *v.* Chandler Dunbar Co., 152 Fed., 25 40
United States *v.* Williams, 30 Fed., 313 19

Gates *v.* Robertson, 30 L. D., 83 21
Gideon F. McDonald, 30 L. D., 124 . . . . . 35, 45
Gray Eagle Oil Co. *v.* Clark, 30 L. D., 570 . . . . . 36, 37
Gregg *et al v.* State of Colorado, 15 L. D., 151 21
Kern Oil Co. *v.* Clarke, 30 L. D., 550 37
Mary E. Coffin, 31 L. D., 175 . . . . . 35, 45
Opinion of Assistant Attorney-General, 30 L. D., 438 14
Rice *v.* California, 24 L. D., 14 . . . . . 18, 20
Regulations of Land Department, 35 L. D., 537; 38 ib., 611; 39 ib., 39 28
State of California, 3 L. D., 327 19
State of California, 7 L. D., 270 . . . . . 20, 46
State of California, 31 L. D., 335 17
State of California, 44 L. D., 468 . . . . . 2, 5, 42, 46
State of Louisiana, 5 L. D., 514, 517 18
State of South Dakota *v.* Thomas, 35 L. D., 171 47
Thomas F. Talbot, 8 L. D., 495 46
Whittington *v.* Mississippi, 30 L. D., 149 . . . . . 17, 19

Cyc., Vol. 32, p. 869 . . . . . 19.
Story on the Constitution, Judge Cooley in fifth ed., Sec. 1938 58

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1920.

JOHN BARTON PAYNE, *Secretary of the Interior*, and CLAY TALLMAN, *Commissioner of the General Land Office, Appellants,*
v.
THE STATE OF NEW MEXICO.
No. 128.

Appeal From the Court of Appeals of the District of Columbia.

BRIEF FOR APPELLEE.

STATEMENT.

The appellants' statement of the case does not mention the following facts:

I. That appellee's selection was filed and made in the local United States Land Office on March 9, 1915. (Copy of the selection is inserted between pages 22 and 23 of the Record.)

II. That notice of the selection was duly published in a newspaper from May 28, 1915, to June 25, 1915, and was otherwise given (R. 13).

III. That the papers in the selection were received in the General Land Office at Washington on April 13, 1915, and that proof of the required notice thereof to the public was received in said office on August 23, 1915 (R. 20).

IV. That the base land of the selection was eliminated from the National Forest on April 3, 1916, more than a year after the making of the selection (R. 14).

V. That the selection was rejected by the General Land Office because of the elimination of the base land from the National Forest on May 16, 1916 (R. 15).

VI. The appellants "admit that the plaintiff (appellee) has conformed to rules and regulations prescribed by the Department of the Interior in the matter of lieu selections of public lands" (R. 19).

Appellants' statement, while referring to the pertinent statutes of Congress, does not allude to the provisions of the Constitution and acts of the legislature of New Mexico which evidence that State's acceptance of the trust imposed upon it by Congress in the grant to it of public lands for common school purposes. The State's position here is that there is a compact, an agreement between the State and the United States which the defendants would impair if the State abided what it deems to be an unlawful attack upon its rights under such grant. The State contends here that the rule of decision announced by the Secretary of the Interior in his opinion of October 7, 1915, in State of California, *et al.* (44 L. D. 468), is such unlawful attack.

ARGUMENT.

I.

Wherein This Case Is Readily Distinguishable From Certain Other Cases Now Before This Court.

Lest we misstate the facts in John Barton Payne, Secretary of the Interior, Appellant *v.* The Central Pacific Ry. Co., No. 17, October Term, 1920, and State of Wy-

oming, H. S. Ridgely and The Midwest Refining Company *v.* The United States, No. 257, October Term, 1920, or express views thereon without permission from either the Court or the counsel in said causes, we shall not discuss them here. However, as the said two cases and the instant case are to be argued at about the same time, we should emphasize the following facts in the latter, to wit:

I. That the land New Mexico selected is without any value whatever for any mineral whatsoever.

II. That the land New Mexico selected was not, after selection, described in an attempted withdrawal of same by the President or anyone else for a public or other purpose.

III. That no contention is made by the appellants that the land New Mexico selected is of a class of lands excepted from the grant to it for common school purposes.

IV. That no contention is made by appellants that the land New Mexico selected is desirable for governmental or other public uses.

V. That the *sole* stated ground for the appellants' decisions against the selection made by New Mexico and for the argument by them in this Court for reversal of the concurring opinions below is that elimination from the national forest of the base land of such selection, subsequent to the making and perfecting of same, deprived the appellants of authority for approval of the selection.

II.

This Proceeding Is Not a Suit Against the United States.

It seems to be the desire of the appellants to impress this Court with the idea that this is a suit involving real property in the State of New Mexico which is claimed by

both the said State and the United States. Of course it is nothing of the sort and bears no resemblance whatever to such a suit. The *res* here is neither the base land nor the selected land in New Mexico. The *res* is the decision of the appellants against which the State has complained. The jurisdiction and power of the judiciary to inquire as to that decision with view to determining whether, if enforced against the selection described in the appellee's pleading, it would visit a wrong and injury upon the State which it is within the province of equity to prevent or avert is the heart and the entire *corpus* of this controversy.

The pleadings in the cause bring before the judiciary a school indemnity selection which the appellants admit was perfect and valid when made. The appellants assent to the proposition that the selection, when made, operated as a perfect and valid appropriation of a tract of public land, at least to the extent of segregating the land until final action on the merits of the selection. The appellants contend, however, that the selection became imperfect and invalid, and that the appropriation it had effected was vacated, when the base land was, without cause given by the State, eliminated from the national forest more than a year after the making of the selection. If that not be their precise contention, the theory of their defense must be that the elimination from the forest deprived them of authority to do aught else than to reject the selection.

This Court need but direct its attention to the prayers of the bill in order to perceive instantly the true character of this litigation. There is no prayer for a writ compelling the defendants, or either of them, to approve the lieu selection by the State. There is no prayer that the defendants, or either of them, issue to the State a muni-

ment of title to the land selected by the State. There is no prayer for a decree quieting in the State the title to the selected land. All that the State has prayed is that the judiciary compel the defendants to desist from conduct with respect to the lieu selection which, as the State alleges, constitutes an unlawful and arbitrary obstruction and barrier against the progress of its selection toward final adjudication thereof *under the acts of Congress relating to the State's grant and said Department's own rules and regulations under those acts and not under a Proclamation by the President*, dated April 3, 1916, 39 Stat., part 2, p. 1774 (*reforming the boundaries of a National Forest*), *which was issued in pursuance of authority conferred by the acts of Congress of March 3, 1891 (26 Stat. 1095), and June 4, 1897 (30 Stat. 11 at 34 and 36) which relate not at all to the grant of school lands to New Mexico.*

The prayers of the appellee's bill are, 1st, for an order restraining the appelants from enforcing with respect to the lieu selection a rule of decision announced in State of California (44 L. D. 468) which is of no conceivable present or prospective advantage or benefit to the United States or the Land Department; 2nd, for a mandatory injunction requiring the defendants to proceed to a judgment on the merits of the lieu selection, excluding from consideration such rule of decision, and 3d for general relief.

With the prayers of the bill clearly in mind it cannot but be perceived that the State seeks absolutely nothing from the United States, as a proprietor, through the medium of this suit. *The State has already, under the lieu selection, obtained from the United States, as a proprietor, all and everything it ever desired or now desires or could possibly obtain.* It is the position of the State

that the appellants have with great unwisdom, if not arbitrarily, sought to becloud what the State *has already acquired from the United States.* It was to preserve what it already possessed and not to acquire something more, that the State instituted this proceeding. The suit of the State is defensive not offensive. Its rights under its grant have been attacked by the appellants in an opinion by them to the effect that an act done by the President under statutes relating exclusively to the administration of lands within national forests, and having no actual or intended bearing on the terms and conditions of the grant to the State, has either taken from the State and destroyed all its equities under its selection or deprived the appellants of authority to approve the selection. While this is plainly a suit to restrain the appellants from an act under the color of their office for which there is no warrant of law and which, if consummated, would impair and detract from the value of the school grant to New Mexico, we nevertheless believe the instant case to be truly original.

However, there are observations in the decisions of the courts which convince us that from no viewpoint of this cause should it be said of it that it is a proceeding against the United States and, therefore, must fail because the United States has not consented to be sued.

It was well said by Mr. Chief Justice Fuller, in Stanley *v.* Schwalby, 147 U. S., 508, 518:

> "In these cases he is not sued as an officer of the Government, but as an individual, and the Court is not ousted of jurisdiction because he asserts the authority of such officer. To make out that defence *he must show that his authority was sufficient in law to protect him.*" (Italics ours.)

It is equally well settled by decisions of this Court that the officials of the Land Department are subject to the jurisdiction of the courts whenever necessary to preserve and protect the property rights of the citizen.

In the case of Cornelius *v.* Kessel (128 U. S., 456, 461), the Court thus stated the rule:

> "the power of supervision and correction is not an unlimited or an arbitrary power. It can be exerted only when the entry was made upon false testimony, or without authority of law. It cannot be exercised so as to deprive any person of land lawfully entered and paid for. By such entry and payment the purchaser secured a vested interest in the property and a right to a patent therefor, and can no more be deprived of it by order of the Commissioner than he can be deprived by such order of any other lawfully acquired property. Any attempted deprivation in that way of such interest will be corrected whenever the matter is presented so that the judiciary can act upon it" (p. 461).

Again, in the case of Garfield, Secretary of the Interior, *v.* Goldsby (211 ib. 249, 261, 262) the same doctrine was thus stated:

> "there is no place in our constitutional system for the exercise of arbitrary power, and if the Secretary has exceeded the authority conferred upon him by law, then there is power in the courts to restore the status of the parties aggrieved by such unwarranted action."

And, finally, in the case of Ballinger, Secretary of the Interior, *v.* Frost (216 ib., 240, 249) the following was stated:

> "Whenever, in pursuance of the legislation of Con-

gress, rights have become vested it becomes the duty of the courts to see that those rights are not disturbed by any action of an executive officer, even the Secretary of the Interior, the head of a department. However laudable may be the motives of the Secretary, he, as all others, is bound by the provisions of congressional legislation."

That a proceeding in equity such as appellee instituted is the appropriate remedy seems to be sustained.

"But it has been well settled, that, when a plain official duty, requiring no exercise of discretion, is to be performed, and performance is refused, any person who will sustain personal injury by such refusal may have a mandamus to compel its performance; and when such duty is threatened to be violated by some positive official act, any person who will sustain personal injury thereby, for which adequate compensation cannot be had at law, may have an injunction to prevent it. In such cases, the writs of mandamus and injunction are somewhat correlative to each other." Board of Liquidation *v.* McComb, 92 U. S., 531, 541.

That an injunction is the proper remedy against an official of the United States, even though he be the head of a Department, where such officer is undertaking to act *ultra vires*, and beyond the scope of his authority, and is violating or attempting to violate the law, to the injury and damage of the complainant, is firmly established by the decision in Noble *v.* Union River Logging Company (147 U. S. 165), in which, after referring to the cases in which mandamus had been issued against the head of a Department to compel the performance of a duty purely ministerial, the Court (147 *ib.*, 171-172) said:

"We have no doubt the principle of these decisions applies to a case wherein it is contended that

the act of the head of a Department, under any view that could be taken of the facts that were laid before him, was *ultra vires* and beyond the scope of his authority. If he has no power at all to do the act complained of, he is as much subject to an injunction as he would be to a mandamus if he refused to do an act which the law plainly required him to do."

III.

There Exists a Contractural Relation Between the State of New Mexico and the United States Under the School Grant.

All the pertinent and material provisions of law relating to the school grant to New Mexico will be found set out in the appellee's bill of complaint (R. 2 to 8).

By the enabling act of June 20, 1910 (36 Stat. 557, 561, 562, 563, 565, the material provisions of which are printed at pages 6 and 7 of the Record), a grant of lands for common school purposes was made to the then prospective State of New Mexico. The grant was one in trust, the terms of the trust being defined by Congress in the enabling act. The grant was accepted and the trust assumed in and by the terms of Section 2 of Article XII, Section 12 of the same Article, and Sections 9 and 10 of Article XXI of the constitution of the State. (See pages 7 and 8 of Record for print of such provisions of the State's Constitution.) The completing of the compact, the making of the grant and the acceptance of it, are evidenced by the Proclamation of the President of the United States, issued January 6, 1912 (37 Stat. 1723), wherein it is declared that "the conditions imposed by the said Act of Congress approved on the twentieth day of June, one thousand nine hundred

and ten" • • • "have been fully complied with" • • • "and the admission of the State into the Union on an equal footing with the other States is now complete."

The public lands belong to the people who have clothed Congress with the power of disposal of them. (Article 4, Section 3 of the Constitution.) In the exercise of that power Congress may grant the lands as an incentive to the material development of the country, as in the case of the grants to railway corporations, and as an inducement to the intellectual development of the people, as in the case of the grants to the States for common schools.

> "The interests of public schools have always been considered paramount to those of railroad companies in grants made to aid in their construction. The one speaks for intellectual; the other for material development." (Minnesota v. Hitchcock, 185 U. S. 373, 401.)

The grant of lands to the *Territory* of New Mexico for common school purposes is found in the Act of June 21, 1898, 30 Stat. 484.

In making such grants Congress may, and always does, prescribe in the acts of grant the conditions under which the grants shall be operative. In the case of the grant to the State of New Mexico it was provided by Congress that the State should (and the State did in and by provisions of its Constitution) accept the grant of lands for common school purposes as a donation of real estate in trust. The objects of the trust and the duties of the trustee were defined and imposed by Congress. When the trust was assumed, the State became obligated to promote its objects, chief of which was the use of moneys arising from the sale and lease of the granted lands in constructing school-houses, equipping them and obtain-

ing the force of teachers essential to the giving of instruction to the youth of the State.

But were there no obligations resting upon the United States? The consideration to the United States for the grant was of vital importance to the United States, to wit, the education of the youth of the United States resident in New Mexico. The United States might have undertaken to afford such education itself, and might have used the public lands in New Mexico to defray the expense. But the United States chose to achieve its desire and to perform its duty to the people in that regard otherwise, and accordingly contributed to the State a fund—created an endowment—out of the public lands, to be applied toward establishment of common schools. It is beside the question here whether the United States made a gift to the State which the United States could recall. The United States has never sought, or evinced a disposition, to recall the fund or endowment. On the contrary, the United States has manifested a desire that the State should be insured, as far as it was possible for Congress to insure it, against loss of any of the lands granted. This desire finds expression in the indemnity and exchange provisions of Sections 2275 and 2276 of the Revised Statutes, as amended by the Act of February 28, 1891 (26 Stat. 796) and in the salutary provisions of the Act of August 18, 1894 (28 Stat. 394).

It is alleged in appellee's bill filed herein, and the allegation is not questioned by the answer, that the State has always diligently and faithfully performed the terms of the trust under which the lands were granted to it. If the State has always done that, then it is not improbable that the State has devised a system of common schools proportioned to the fund—the endowment—Congress gave it for that purpose. If Congress foresaw (and it could not have failed to foresee) that on the credit

of such fund or endowment the State would contract and incur indebtedness toward accomplishment of the design of Congress in making the grant, then Congress foresaw the nature of the obligation it imposed on the United States in thus encouraging and requiring the State to provide facilities for the education of its people. Such obligation was that of rendering readily available by the State the fund or endowment granted to it in consideration for the establishment and maintenance of such educational facilities.

The grant and the acceptance of all its terms was a *quid pro quo. It was a contract. The only parties thereto were the United States, grantor, and the State, grantee.* Neither of the parties thereto acted or act through an agent, unless it may be said that as the grant was made by Congress it was made by the constitutional agent of the United States with respect to the public domain. *But certain is it that the Secretary of the Interior never was and is not now either a party thereto or an agent of any party thereto.* The grant was and is in its express terms complete and was and is a perfect grant by reason of the State's acceptance thereof. *There are no terms or conditions applicable to the grant which are not discoverable in the terms, or in the necessary implication of the terms, of the act making it.*

IV.

The State Complied With All Terms and Conditions of the Grant in Making Its Lieu Selection.

It is among the allegations of the bill *and the admissions in the answer* (1) that the State conformed to rules and regulations prescribed by the Department of the In-

terior in making the selection (R. 19); (2) that the State paid the fees collectible by law under the selection (R. 13); (3) that the Register and Receiver received and entertained the selection and executed a certificate thereto "that there is not of record in this office any adverse filing, entry or claim to the land selected by the State of New Mexico, and that the filing of said list is this day allowed and approved" (see copy of the selection between pp. 22 and 23 of R.); (4) that the State filed the required proof of publication and posting of notice to the public of the making of the selection (R. 13); (5) that the State filed the required proof of non-occupancy of the selected land and of non-mineral and non-saline character thereof (R. 12); (6) that the only ground ever assigned or only reason ever stated by any officer of the Land Department for rejection of the selection was that the base land supporting it was eliminated from the forest reservation before the selection received the approval of the Secretary of the Interior (R. 28 to 34).

Those allegations of the bill which are denied in and by the answer are chiefly conclusions, to wit: (1st) that the selection was accompanied by a quit claim deed from the State to the United States for the base land; (2d) that such quit claim deed constituted a perfect deed of reconveyance of the base land to the United States. As to these matters it suffices to remark that by act of the legislature of the State of New Mexico, approved June 14, 1912 (Laws of New Mexico, 1912, at page 174 et seq.), it is provided that the Commissioner of public lands of the State "shall have the power" * * * "to deed by quit claim or otherwise to the United States," etc.; and that in the making of the selection here in question the State Land Commissioner (as shown in and by

his certificate to such selection) expressly invoked and acted in pursuance of the said act of the legislature of New Mexico. Moreover, the Land Department has never at any time in its history, since January 26, 1901, date of the Opinion of Assistant Attorney-General Van Devanter (30 L. D. 438), questioned the validity and sufficiency of a State lieu selection thus executed *as the muniment of the title of the United States in and to the base land.*

The untrammeled, natural and legitimate enjoyment of the grant by the State, freed from all artificial and inartificial obstructions and impediments interposed by an officer of the United States, was as much to be desired by the United States as by the State. It requires no superior intelligence to perceive that Congress intended and expected that the State would project a system of common schools and appropriate for their construction and maintenance in reliance upon the fund or endowment created by the school grant. Who can doubt the serious disadvantage and detriment to the public interests of the State of any conduct on the part of the Secretary of the Interior that impedes the State in obtaining possession of all or any part of such fund or endowment and applying it to the uses contemplated by Congress?

V.

The School Grant Attaches to the Sections Specified Upon Identifiction Thereof by Survey and to the Indemnity and Lieu Lands Upon Identification Thereof by Selection.

It is inconceivable by us that under the facts set out in the pleadings in this cause and in the light of the law

applicable thereto this court would be disposed to distinguish the contract arising out of the acceptance of a grant of lands to a State in aid of common schools from the contract arising out of the acceptance of a grant of lands by a railway corporation in aid of transportation.

As to the time of taking of effect of the grant of indemnity lands *to a railway corporation* it was said in Ryan *v.* Central Pacific R. R. Co. (99 U. S. 382, 386):

> "Under this statute, when the road was located and the maps were made, the right of the company to the odd sections first named became *ipso facto* fixed and absolute. With respect to the 'lieu lands,' as they are called, the right was only a float, and attached to no specific tracts until the selection was actually made in the manner prescribed."

The foregoing doctrine was approved and re-affirmed in the opinion in United States *v.* Southern Pacific R. R. Co. (223 U. S. 565, 570), wherein it was said:

> "What a railroad is to be indemnified for may be fixed as of the moment of the grant, but what it may elect when its right to indemnity is determined depends on the state of the lands selected at the moment of choice."

Such doctrine with respect to railway indemnity selections was applied in Weyerhaeuser *v.* Hoyt (219 U. S. 380, 387-8), in which case the court availed of the occasion to refer to the scope of the jurisdiction and power of the Secretary of the Interior with respect to such selections in these terms:

> "The requirement of approval by the Secretary consequently imposed on that official the duty of determining whether the selections were lawful *at the time they were made,*" * * * (Italics by counsel.)

In the case of Daniels *v.* Wagner (237 U. S. 547, 557-558, 560, 561), the court considered and stated the effect in law of a perfect selection under the forest lieu lands act of June 4, 1897 (30 Stat. 36). In language expressive of reprobation of the extremes to which the Land Department goes, sometimes, in the exercise of what it denominates as its discretion, the court applied to the perfect forest selection the principle which is peculiar to no one class of selections but which is equally applicable to any selection which can be perfected by acts done by the selector.

An analysis of the decisions of this court in cases involving the effect of selections of indemnity lands by railway corporations shows (1st) that the court fixed upon the status of the lands at the time of selection as determining whether the railroad rights attached thereto and (2d) that the court recognized as lodged in the Secretary of the Interior the power and duty to ascertain and determine whether the selection itself was lawful at the time it was made. Nothing is found in the decisions of this court recognizing, in the slightest degree, any arbitrary or discretionary power in the Secretary of the Interior to reject an indemnity selection that was lawful at the time it was made.

The grant of Sections 2, 16, 32 and 36 in every township in New Mexico was made by Section 6 of the enabling act. (See print thereof at page 6 of Record.) That section of the statute declares that said sections of land "are hereby granted." The lieu and indemnity lands were granted to said State in and by that provision

of section 6 of the enabling act which extends the benefits of sections 2275 and 2276, Revised Statutes, as amended by the act of February 28, 1891 (26 Stat. 796), to the State of New Mexico. The lieu and indemnity lands are "hereby appropriated and granted" in the express terms of those sections of the Revised Statutes. Both grants, the one of the specific sections and the one of the lieu and indemnity lands, are, we contend, grants *in praesenti*.

When Congress amended Sections 2275 and 2276, Revised Statutes, this doctrine of grants *in praesenti* had been firmly implanted in the law, and this legislative meaning of an immediate grant of the fee had been affixed to the phrase "hereby granted," so that Congress used the term advisedly, and deliberately chose to express its donation of the lieu lands and its intention regarding them in words which it knew the courts must construe to mean that the lands were thereby given, presently and absolutely. Northern Pacific R. Co. *v.* Musser-Sauntry Land Co. 168 U. S. 604, 611; Whittington *v.* Mississippi, 30 L. D. 149.

By all rule and all reason, therefore, by every canon of statutory construction, the meaning that must be attributed to amended Sections 2275 and 2276, Revised Statutes, is that it gives the lieu lands to the grantee States, directly and immediately, and as effectually as public lands are ever passed by Congressional acts of grant.

In the highest and truest sense the statute making the grant of the specific sections is in *pari materia* with the statute granting the lieu lands. State of California, 31 L. D. 335. The purpose of both grants was to give to New Mexico a quantity of land commensurate with its superficial area, and to give the 2d, 16th, 32d and 36th

sections in place as far as they will go, and then the so-called lieu and indemnity lands to fill out the grant. The latter are given in the same way, for the same purpose, and by the same terms of donation as the specified sections.

It is well established doctrine that the grant of the specific sections in place attaches and passes the title to such sections to the States at the time of survey of such sections, if they are not then subject to settlement claims, not known to be mineral in character and not within a reservation. Gaines *v.* Nicholson, 9 How. 364; Beecher *v.* Wetherby, 95 U. S. 524; Water and Mining Co. *v.* Bugbey, 96 U. S. 167; Mining Company *v.* Consolidated Mining Company, 102 U. S. 172; Hibbard *v.* Slack, 84 Fed. 574; Sherman *v.* Buick, 45 Calif. 669; Saunders *v.* Mining Co. 125 Calif. 159; Rice *v.* California, 24 L. D. 14.

We submit that the identification of indemnity lieu lands by selection is the same as identification of the specific sections by the survey. Leavenworth R. Co. *v.* United States, 92 U. S. 733, 740; Hamilton R. R. Co. *v.* Smith, 9 Wall. 99; Irving *v.* S. F. S'v'gs Union, 136 U. S. 579; Tubbs *v.* Wilhoit, 138 U. S. 134, 146; State of Louisiana, 5 L. D. 514, 517.

The method of identification is fixed by the granting act, which provides that the lieu lands "shall be selected" by the grantee State. This is more than a permission to select, it is the only method of identification provided. It is a power of identification and an investiture of agency in the State to carry out the grant by finding and pointing out the lands to come under the grant. Southern Pacific R. Co. *v.* Bell, 183 U. S. 687; Weyerhaeuser *v.* Hoyt, 219 U. S. 387.

Nothing more than identification is needed to give the

grant of indemnity and lieu lands precision and to effectuate it. We are not to forget that it is a grant in *praesenti*, and that, *ex proprio vigore*, it attaches its living title to what had already been granted. It needs only to find the description of the thing granted, to reduce a generality to exact terms. And this is exactly and fully done by the State's selection, done in the way that satisfies the Statute, and in the specific way that the Statute says it shall be done.

Rutherford *v.* Green's heirs, 2 Wheat, 194, 204;
Lessieur *v.* Price, 12 How., 76;
Fremont *v.* United States, 17 How., 559;
Dickens Lessee *v.* Mahana, 21 How., 282;
Hedrick *v.* Hughes, 15 Wall., 129;
Best *v.* Polk, 18 Wall., 118;
Beecher *v.* Wehterby, 95 U. S., 524;
Deseret Salt Co. *v.* Tarpey, 142 U. S., 248;
Curtner *v.* United States, 149 U. S., 675;
United States *v.* Loughrey, 172 U. S., 210;
United States *v.* Williams, 30 Fed., 313;
Doll *v.* Meador, 16 Cal., 320;
Bludworth *v.* Lake, 33 Cal., 261;
State *v.* Tanner, 102 N. W., 237;
Whittington *v.* Mississippi, 30 L. D., 149.

"A grant of lands to be selected becomes absolute, and the State becomes vested with the fee simple title, on its acceptance of the terms of the grant and its selection of the land." 32 Cyc. 869.

In the opinion of the Department of the Interior heretofore, if not now, the due selection of lieu lands by a State gave an absolute right to the State to the lieu lands. It was so declared in State of California (3 L. D. 327, 329), in these words:

"In other words, the State's right to indemnity for lands found by the public survey to be within any of the exceptions specified by the statute was absolute and immediate, and, when it was so discovered that the school lands or any portion thereof had been lost in place, the right to select other land in lieu thereof accrued to the State *eo instanti*. This is simply a *quid pro quo* to which she is justly and unquestionably entitled by virtue of the very terms of the statute."

"By the act of selection the title of the State became vested in the tract so selected, and all right to the basis was by said act completely divested, so that the title could not thereafter vest in the State, although the settler may have failed 'to make good his claim.'" State of California (7 L. D. 270, 272).

* * * "and having exercised this right by making selection of the land in controversy, her title to said tract was then completed, and by said act of selection she completely divested herself of all right thereafter to claim the part of section 36 used as the basis of said selection." State of California (7 L. D. 270, 272).

So completely does the selection pass the title to the base to the United States that in Rice *v.* State of California (24 L. D. 14), Secretary Francis, after finding that there was nothing in "the evidence submitted to show anything to defeat the operation of the grant" in passing title to a school section in place, ruled, notwithstanding, that as the State had applied for indemnity for the section it had thereby waived its claim and right thereto and was estopped to make the claim that it owned the land assigned as base for indemnity.

> "Conceding that the school grant attached to the specific sections after they were designated by survey, the State having selected equivalent land in lieu thereof, the government may hold the State to its waiver of the school section and dispose of it as part of the public domain." Gregg *et al. v.* State of Colorado (15 L. D. 151, 154).

In Gates *v.* Robertson (30 L. D. 83), it was held that the then Territory of Oklahoma could not, by an attempt at exercise of dominion over a school section after it had been conveyed to the United States by a selection of other lands in lieu thereof, recede from the selection.

VI.

A Perfect Lieu Selection by a State Under Its School Grant Has More Than All the Attributes of a Final Entry; It Is the State's Muniment of Title to the Selected Land and the Muniment of Title of the United States to the Base Land.

Citation of authority upon the proposition that a State selection presented in accordance with law and departmental regulations, and accepted by local officers, has the same segregative effect (*i. e.* removes the land embraced therein from the category of public lands) as a homestead or other entry is hardly necessary. We are certain that the court knows such proposition to be one uniformly maintained in and by the courts and the Land Department. But a perfect State selection does more than merely reserve the land from other appropriation. If it did only that it would be nothing more in legal effect than a homestead or desert land entry under which the

entryman had not completed compliance with all legal requirements and therefore had not submitted due proof of such compliance.

We submit that a *perfect* State lieu selection vests in the State a title which is even superior to the equitable title which passes under a final homestead or desert entry after submission of proof of compliance by the claimant with all legal requirements. We submit that a perfect State selection passes to the State the *legal title* to the selected land *and from* the State and to the United States the *legal title* to the base lands. We submit that the act making the grant coupled with such perfect selection constitute the combination of required elements which form the muniment of title in the State to the selected land and in the United States to the base land. *Of course this proposition of ours is stated only with respect to a perfect selection of lands of the class subject to selection.*

How would the United States prove its title to the base land in a selection which the Secretary of the Interior had approved, if the title thereto were questioned? Would not the United States offer as primary and best evidence of the title the documents in such selection? Such selection is the waiver, the deed, by the State to the United States. What are such documents? *They can be nothing other than the act making the grant and the selection identifying the lands to which the grant attached.* The act granting indemnity and lieu lands points out the muniment of title by providing that the State "may select," thus rendering a selection the *sina qua non* of title in the State to the lieu lands and title in the United States to the base lands. Moreover, that act expressly declares what shall be the effect in law of a selection by the State. It says that such selection shall be a waiver by the State of its right to the section in place.

A State is not helpless to prove its title to a *section in place* because it has neither a patent nor an approved selection list to which to resort for proof. *It proves its title to the section in place by proving (a) the statute that granted the section and (b) that the section was not one of those excepted from the grant.* There is absolutely no difference between the grant of the sections in place and the grant of the lieu lands, other than this—that the sections in place are specifically designated by the grantor, while the lieu lands are, in accordance with both the intention and express authorization of the grantor, specifically designated by the grantee. Until the sections in place have become known by survey, the grant is inoperative. Until the lieu lands have become known by selection, the grant is inoperative. But when survey is made, or when a selection is perfected, the grant then attaches to definite lands and the Secretary of the Interior has as little power to detach the grant when it has attached as he has to interfere with any other grant under any other law of Congress.

To assume that a State stands in need of an approved selection list to prove its title under a perfect selection of lieu land, is to assume that a Secretary of the Interior may, by some act or omission of his, effectually deprive a State of title to land it has acquired under a grant made by Congress, and deprive the United States of title to land it has acquired from a State. The States are not utterly helpless when, through an error of judgment of a Secretary of the Interior, a selection is rejected when it should have been approved. The Judicial Department of the government is *not* bound by the law as interpreted and construed by the Executive Department.

In McKenney *v.* Carson (99 Pac. 660), it was said:

"In other words, the refusal of the Secretary of

the Interior to make the approval did not necessarily affect the passing of the title, but his approval was evidence of the facts that the lands were of the character designated in the enabling act and were subject to the grant; if, therefore, the selected lands in fact were of the character granted in the enabling act that then the Secretary could not, by a mere rejection, defeat the rights of the State, since the enabling act conferred no such power upon him." (See also Brigham City *v.* Rich, 97 Pac. 220.)

• • • "the certificate of that officer, when the previous requirements of the law have been complied with, is only an official recognition that the lands are of the character designated, and of the completeness of their segregation." Wright *v.* Roseberry, 121 U. S. 488, 520, 521.

An approved selection list is in name, terms and effect a record of the judgment of the Secretary of the Interior that the lands described therein have passed to a State under the grant, *not under the clear list;* under the selections, *not under the approval thereof.* But it is not such judgment of the Secretary of the Interior that passes the title to the selected land. Nor *is it the decree of a court of equity sutaining a deed as a valid conveyance that passes the title. The decree simply declares that the deed passed the title.* So it is when the Secretary of the Interior approves a clear list, he simply makes a record to the effect that the selection passed the title to the base land to the United States and that the Congressional grant passed the title to the selected land to the State.

"The patent or certification by which title is transferred from the government partakes of the nature of a judgment, and, in so far as it is a judgment, it is clothed with the invulnerability and conclusiveness of a judgment." Southern Development Co. v. Endersen, 200 Fed. Rep. 272, 277.

An approved selection list always bears a certificate by an examiner in the General Land Office to the effect that the *selections* have been examined and that the lands selected "have been found to inure to the State *under its grant.*" This certificate by the examiner in the General Land Office is executed before the list is submitted to the Secretary of the Interior for that officer's action thereon. As it has been the ancient practice in the General Land Office to find that the lands "have been found to inure to the State *under its grant*" before submission of a clear list to the Secretary of the Interior for action thereon by him, *then it must be plain that the Secretary of the Interior never approves a clear list until after he has found that the grant has attached to the lands described in the clear list.* In other words, all the circumstances attending the preparation and submission of a clear list for approval by the Secretary of the Interior show, convincingly, *that it is a condition precedent to an approval that it be ascertained that the grant has already attached.* We conclude therefore that every act performed by the Land Department in the matter of selections is an act expressive of a judgment as to the effect in law of a selection at the time it is perfected by the State.

> "Where, by reason of the loss of the school sections, a selection is made of other lands, the list certified operates upon the selection *as of the day when made* and reported to the local land office, and cuts off, as would a patent in such cases, all subsequent claimants."
>
> * * * * * * *
>
> "The subsequent approval of the selection by the Secretary of the Interior and the listing of the land to the State by the Commissioner of the General Land Office, completed the proceedings *which vested*

the title in the State as of the date of the selection." McCreery *v.* Haskell, 119 U. S. 327, 331.

Weyerhaeuser *v.* Hoyt, 219 U. S. 380, 388, renders unmistakable the proposition that the approval of a selection is a quasi-judicial act and when performed brings "into play the elementary principle of relation."

But it is not essential to the relief New Mexico has prayed for in this proceeding that this court agree with us that the *legal title* to the selected land is acquired by a *perfect selection thereof. By a perfect selection we mean, of course, not only one that conforms to the letter of the law and regulations, but one which was made in absolute good faith and of land of the class granted to the State.* It is sufficient for all the purposes of New Mexico in this proceeding that its equitable rights to title to land selected in good faith under a perfect selection be protected.

VII.

It is Contrary to the Meaning of the Words "Under the Direction and Subject to the Approval of the Secretary of the Interior," For That Officer to Exercise His Discretion as Distinguished From His Judgment With Respect to Selections.

The entire case of the appellants may be stated thus—That an executed exchange of lands between a State and the United States implies an offer and acceptance and that such exchange requires the act of two parties—the State and the United States *acting through the Secretary.*

We are in complete agreement with the appellants that an executed exchange implies an offer and acceptance and requires acts by two parties. The difference between

us and the appellants is as to who offers and who accepts under a State lieu selection. The appellants contend that it is the State that offers and the United States that accepts, while we contend that it is the State that accepts the offer made by the United States by and under the grant. We think that it is very plain that amended sections 2275 and 2276, Revised Statutes, expressly grant (thereby offer) to the State public lands in lieu of State owned lands in a government reservation; and that said sections expressly provide that upon acceptance of such grant (or offer) by the State under a lieu selection it thereby, as stated in those sections, waives and loses its right to the base land of the selection and also thereby causes such land to pass to the United States.

What could have been meant by Congress when it provided that lieu lands "shall be selected" by the State, if it was not meant thereby to indicate and authorize an act by the State (the act of selection) which would be both an acceptance of a particular tract of granted lieu land and an identification thereof?

The major difference between us and the appellants, however, is over their claim that in the matter of an exchange the United States acts through the Secretary. The United States acts through Congress, we think, and did so act when it made the grant of lieu lands which was very solemnly accepted by the State several years ago simultaneously with its acceptance of the grant of the specific school sections.

Section 11 of the act enabling the people of New Mexico to be admitted into the Union provides "that all lands granted in quantity or as indemnity by this act shall be selected, under the *direction* and subject to the approval of the Secretary of the Interior." (Italics ours.)

The Secretary of the Interior has formally given "*di-*

rection" as to the selection of lands by the States. His *"direction"* in that regard will be found in his rules and regulations (35 L. D. 537; 38 *ibid.* 611; 39 *ibid.* 39) governing in the matter of such selections. With such rules and regulations the State of New Mexico complied fully; and it is admitted in the answer that there was due compliance therewith. It seems to us that as the selection is admitted to have been made under such "direction" it was entitled to "approval" as a matter of right, were any approval essential (which we deny). But that is not the view of the Secretary of the Interior, who contends that (despite full compliance with his *"direction"*), he rests under no obligation to any one to give his "approval"; and that as the statute provides that the selection shall be "subject" to such approval he may reject and cancel it for matters and things not covered by the grant and not mentioned or even hinted at in the Departmental rules and regulations.

The situation would be different, we concede, if the act making the grant, or the rules and regulations that constitute the Secretary's "direction" under the grant, warned the State that it might be doing a vain and idle thing in selecting lands in lieu of those in a forest reservation because of the possibility of elimination of the base land after perfecting of the selection and before approval thereof. But the State assumed no risk in making the selection, and foresaw no contingencies with respect to the base land other than such risk and contingency as could be inferred from the terms of the act making the grant and the provisions of the Departmental rules and regulations.

Congress used the words "subject to the approval of the Secretary of the Interior" in order to safeguard the United States against possible appropriation by the State

of any lands not within the purview of the school grant; and in so doing did not impose a mandatory requirement that a selection of lands admittedly within the purview of the grant shall not be binding upon the United States until approved by the Secretary of the Interior. To rule that Congress intended that the United States should be obligated under the school grants only in the event that the Secretary of the Interior shall approve a selection under those grants would be to rule (a) that, although the grants of lieu lands were made directly to the States, the States are powerless, acting alone, to perform any act in acceptance of the grants that would in any wise obligate the United States thereunder, and (b) that there has been delegated to the Secretary of the Interior the power to contract in the name of the United States with the several States for the passing to them of the legal title to lands already granted to them as lieu lands, and that there can be no such contract until such "approval.'

The idea of the Department is that until the Secretary has approved a selection there is no meeting of minds between the United States and the State with respect to lieu lands. This idea presupposes that the Land Department is the mind of the United States so far as school grants are concerned. But this idea is based upon an entire misconception of the functions of the Secretary in connection with public lands. The mind of Congress usually thinks and determines for the United States in such matters. If it is competent for Congress to enact a statute making a grant which, upon acceptance of its stipulations and conditions by the grantee, becomes a contract between such grantee and the United States, why may it not, as it did in the case of school grants, make it in such terms as to render a sub-agent, or an

additional mind, quite as unnecessary as a fifth wheel of a wagon? The grant of school lands was accepted by the State when it entered the Union, and it was that time that there was a concourse of minds between the United States and the State. Nothing has since been enacted by Congress affecting that concourse of minds.

While the Department of the Interior has a function of mind to discharge in school grant matters it is a function limited to the duty of adjudging just what is comprised in the contract on which there was a perfect concourse of mind between the United States and the State of New Mexico several years ago.

If Congress had said "subject to the *judgment* of the Secretary of the Interior," it would have said nothing different in legal effect from what it did say. But the Secretary apparently labors under the impression that he is the agent of the United States in effectuating the grant; that Congress has clothed him with the discretion to put the grant in operation, or suspend its operation accordingly as in his discretion it is desirable to do so.

Discretion and judgment are not one and the same thing. Government by official discretion has its natural and most congenial habitat elsewhere than in America. We have endeavored in this country by constitutions, popular assemblies and statutes to keep from officers in the Executive Department of the Government the power to govern in a manner conformable only to their discretion. We prefer here government in accordance with judgment as to what is the will of the people as expressed in the enactments of Congress, or a government by law and not by men. Judgment acts in accordance with rule while discretion is its own rule.

> "Indemnity lands are selected under the direction of the Secretary of the Interior whenever the grantee

thereof complies with the directions which the Secretary has published for the regulation of such selection. The Secretary was not clothed with the power to defeat the grant of the indemnity lands, or by capricious regulation to affect the title which was intended to be conveyed." Groeck *v.* Southern Pacific R. Co., 102 Fed., 34.

Speaking of the indemnity school land grant to Nevada, which provides for selections to be "approved by the Secretary of the Interior," it was said that by this provision "no arbitrary discretion is vested in the Secretary" (Williams *v.* United States, 138 U. S. 524) and speaking again of the provision in the general lieu land act of February 26, 1859 (11 Stat. 385), requiring approval of State selections, this Court said that it is to be taken "simply as describing the general mode of procedure." (Johanson *v.* Washington, 190 U. S., 179, 183, 184.)

The exercise by the Secretary of judicial control is not confined to indemnity selections. In large measure his general powers and duties, under the whole body of land laws and in passing upon many kinds of land claims, are judicial. We think that the condition in the indemnity acts, that the selections thereunder shall be subject to the Secretary's approval, is of small import, and that without it his duties and his powers in administration of the act would be the same. He would still have to exercise the same judicial functions—find whether the facts and decide whether the law permitted the selection. He exercises the same functions, and must exercise them, in allowing or disallowing homestead or scrip entries, or deciding contested cases or refund claims. The Department is, indeed, one of the great courts of the land.

Smelting Company *v.* Kemp, 104 U. S. 640;
Noble *v.* Union River Logging Railroad, 147 U. S. 175;
Bishop of Nesqually *v.* Gibbon, 158 U. S. 166;
Brown *v.* Hitchcock, 173 U. S. 478;
Hawley *v.* Diller, 178 U. S. 488;
Cosmos Co. *v.* Gray Eagle Oil Co., 190 U. S. 309;
King *v.* Andrews, 111 Fed. 863.

The responsibility as well as the power rests with the Secretary.

Riverside Oil Co. *v.* Hitchcock, 190 U. S. 325.

"The phrase 'under the direction of the Secretary of the Interior' * * * was intended as an expression in general terms of the power of the Secretary to supervise and control the extensive operations of the Land Department of which he is the head. It means that, in the important matters relating to the sale and disposition of the public domain * * * the Secretary of the Interior is the supervising agent of the Government to do justice to all. * * * The Secretary is the guardian of the people of the United States over the public lands. The obligations of his oath of office oblige him to see that the law is carried out. * * * He represents the Government, which is a party in interest in every case involving the surveying and disposal of the public lands." Knight vs. Land Association, 142 U. S. 177, 178, 181.

"Neither the general jurisdiction nor the supervisory power of the Commissioner, or the Secretary, is arbitrary or unlimited. The effective exercise of each is conditioned by established rules of law. The settled rules and practice and the uniform decisions of the Department constitute both rules of law and property, and equitable titles in entrymen can not be destroyed by the Land Department in violation of them. * * * Equitable titles of claimants to lands

> under the acts of Congress may not be annulled by the Land Department in violation of its settled practice, or of a rule of law and of property established by a long line of decisions of its officers, nor without legal notice to the parties in interest and an opportunity to be heard." Howe *v.* Parker, 190 Fed. 757.

Speaking of an entry or claim to land, duly filed and before the officers of the Department, Mr. Justice Van Devanter said:

> "Whilst it undoubtedly is subject to examination and consideration by them, this is not that they may elect whether or not they will consent to its allowance, but that they may ascertain whether or not the applicant has acquired a right to its allowance—a right which is acquired, if acquired at all, at that point of time when the applicant has done all that he is required to do in the premises, instead of at the time of its recognition by them."

And further:

> "Land officers are powerless to adopt any regulation which is any wise inconsistent with or repugnant to the public land laws, but do possess ample power to enforce the laws." Leonard *v.* Lennox, 181 Fed. 762, 766.

> "If the Secretary of the Interior may add by regulation one condition, may he not add another? If he may require a witness or witnesses in addition to what Sec. 2291 requires, why not other conditions, and the disposition of the public lands thus taken from the legislative branch of the Government and given to the discretion of the Land Department. It is not an adequate answer to say that the regulation must be reasonable. The power to make it is

> expressed in general terms. If given at all it is as broad as its subject and may vary with the occupant of the office. This is to make conditions of title, not to regulate those constituted by the Statute." United States *v.* George, 228 U. S. 21.

In short, if a State school indemnity selection is competent and perfect in all things the Secretary of the Interior exercises no function other than to find it is competent and perfect—a function to which he is rigidly confined, with few exceptions, in dealing with all public lands. When he exercises that function his approval relates back, past the act of the State in making the selection, to the date of the granting act itself, and fixes the fact that the selected land was then granted.

VIII.

Not One of the Cases Cited as Authority in the Appellants' Brief is in Point or Even of Value Suggestively.

Several opinions of this Court are cited and apparently relied on by appellants for the sustaining of the contentions they have advanced. As it is not the habit of courts, however, to adopt the views of counsel without first ascertaining through personal and independent inquiry whether warrant therefor can be found either in the written law or in judicial interpretation, we feel no uneasiness due to the adjudicated cases referred to in appellants' argument.

We have never felt that the obligation of an attorney to court and client imposed upon the attorney the duty of demonstrating the obvious. Therefore we abstain from indulging in extended comment on the cases cited

by appellants, none of which is apposite in the slightest degree, the facts in none being similar to the facts here *and none involving the question of the effect of elimination of base land from a national forest after perfection of a school grant selection of land in lieu thereof.*

It will be observed that the appellants make an effort in their brief to assimilate a forest lieu selection to a State lieu selection. The most serious criticism that can be made of such effort is to say that the Land Department has expressly held (Gideon F. McDonald, 30 L. D. 124, 125; Mary E. Coffin, 31 L. D. 175) that where a selection under the Forest Lieu Act has been perfected, although not formally approved, the subsequent elimination of the base land from the forest has no effect whatsoever upon such selection. If the Land Department had perceived the existence of any true analogy between forest lieu selections and State lieu selections that Department would doubtless have applied to the New Mexico State selection now before this court the "Rule of Reason" which it has said (in Gideon F. McDonald, *supra*), is applicable to forest lieu selections but which it here declares is inapplicable to State lieu selections.

To discuss each one of the alleged authorities cited by the appellees would seem to be unnecessary in view of the fact that Cosmos Co. *v.* Gray Eagle Co. (190 U. S. 301), is plainly the only case cited by the appellants on which they make any real reliance for reversal of the courts below.

The decision in Cosmos Company *v.* Gray Eagle Company, *supra*, rests upon something entirely different from a conclusion that the equitable title could not vest until approval of the selection. The decision rests upon the conclusion that the courts do not have concurrent jurisdiction with the Land Department over claims to the pub-

lic lands while such claims are *in fieri*, and that until the forest lieu selection had been considered and finally disposed of by that Department the courts were powerless in such a case as the Cosmos case to determine questions as to the character and extent of rights acquired under the selection. The court made it plain that to decide the questions complainant desired it to decide, notwithstanding the fact that the sufficiency of the selection was then a question before the Land Department, would be to yield to a suggestion that the courts could either anticipate the decisions of that Department in a case pending before it or preclude the Department, after it had taken up the case for action, from rendering any decision therein contrary to views on the case theretofore expressed by the courts. (For a history of after events in the Cosmos case, see Gray Eagle Oil Co. *v.* Clarke, 30 L. D. 570.)

The case at bar is wholly unlike the Cosmos case. There the Land Department had never decided whether the selection was sufficient when made. Here the Land Dpartment concedes that the selection was perfect when made. There the Land Department had rendered no final decision. Here it has rendered such decision. There it was contended that the Register and Receiver rendered the final decision when they accepted the lieu selection, although it was imperfect and incomplete at that time. Here, no such contention is made. There it was attempted to forestall an inquiry and determination by the Land Department as to the character of the selected land. Here no such attempt is being made.

But our discussion of the *Cosmos* case would be deficient in both completeness and sincerity, if we failed to notice the frequent allusions in the opinion in that case to the effect that the equitable title to land selected

under the act of 1897 does not vest until approval of the selection. Whether that doctrine is sound or not is not material here, for the reason that the act of 1897 is wholly unlike amended section 2275, Revised Statutes. That the approval gives the selector under the act of 1897 the equitable title does not mean that he had no rights under the law before he acquired such title. It was his antecedent legal right under the selection that entitled him to the approval. Congress concerns itself quite as much about such antecedent legal rights as it does about rights of the holders of the equitable title to public lands. And we may add that judged by its discussion of the said act of 1897 in Kern Oil Co. *et al. v.* Clarke (30 L. D. 550), and Gray Eagle Oil Co. *v.* Clarke (*Ibid.* 570), the Land Department appears to have accorded greater respect to the inferior right acquired by selection under said act of 1897 than it has to the superior right acquired by selection under amended section 2275, Revised Statutes. The purpose of all legislation by Congress subsequent to enactment of amended section 2275, Revised Statutes, has been to enhance the value of the school grants which are esteemed as grants for a beneficient public purpose. All legislation subsequent to the act of 1897 was restrictive of the right thereunder and that act is now repealed. Congress did not deal directly with owners of real estate within National Forests when it enacted the act of 1897. It did deal directly with the States when it made grants of lands to them. *The act of 1897 was only an offer. The act of 1891, amending section 2275 and 2276 of the Revised Statutes, was both an offer and a grant.*

There is this difference to be noticed between the approval of a selection under the act of 1897 and approval of a lieu selection by a State. The approval of the for-

mer does not pass the legal title. The approval of the latter constitutes the evidence of the legal title to the selected land, which passed to the State at time of the grant's attaching to the lands; and that time is the time of perfecting of a selection. A patent is necessary to pass the legal title under the former. A patent is not necessary to that end with respect to the latter. Approval of the former gives the selector the equitable title which is merged with the legal title when patent issues. Approval of the latter is not the merging of the selection into an approvad clear list. It is a judgment that the legal title passed theretofore. Approved clear lists almost invariably include various tracts taken from different original lists of State selections. The States have nothing to do with the actual preparation of such clear lists. They are merely a form adopted by the Land Department to promote convenience in handling State selections. Such clear lists are prepared in the General Land Office and submitted to the Secretary for his consideration and action.

Is there no legal inference to be drawn from all this? It seems to us that the legal inference is that the date of the filing of the original selection marks and fixes the time when all the equitable and legal rights of the State under a selection perfect when made attach; and that approval of a clear list is simply an adjudication accordingly. We believe that the grant of school lands was self-operative with respect to the sections in place and that it was intended by Congress to be operative with respect to lieu lands upon the performance of some act by the States and not upon performance of some act by the Secretary of the Interior. We believe that, as has been said frequently by the Land Department heretofore, that a perfect selection by a State of lieu land

transfers the school grant from the section in place to the selected lands the instant the selection of lieu lands is perfected, and that thereafter the Land Department has absolutely no jurisdiction over the selected land except such as it may exercise in determining whether the selection was perfect when made. We conclude therefore that the opinion of the court in Cosmos Company v. Gray Eagle Company, *supra*, announced a doctrine controlling in the administration of the act to which that doctrine was intended by the court to relate. But that doctrine is in no wise either controlling, or valuably suggestive, with respect to administration under a wholly dissimilar act.

IX.

Acts of the President Under Legislation Relating Exclusively to the Administration of National Forests Do Not Impair the Rights of a State Under Legislation Granting Public Lands for School Purposes.

The writer has always been of opinion that the long controversy between the States and the Land Department over the matter discussed in this brief was in very narrow compass; that the single question involved has ever been whether there is discoverable in any Act of Congress any mandate laid on the Secretary of the Interior to act as an instrument of the United States in repudiating its obligation to a State after the latter has duly perfected a selection of lieu lands under its school grant. Unquestionably there is repudiation by the United States if, after it has encouraged the perfecting of such selection, it is guilty of conduct inconsistent with its obliga-

tions under such selection; and unless there is discoverable some statute imposing upon the Secretary of the Interior the disagreeable duty of effectuating a repudiatory design of the United States, we shall continue to believe that said officer's conduct toward the selection here in question was and is wholly unwarranted.

> "The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach the term implies, as it would be if the repudiator had been a State or a municipality or a citizen." Sinking Fund cases, 99 U. S. 700, 718, 719.

> "It derogates from the dignity and character of the Government to suppose that, formed as it is to secure impartial justice between individuals, it may nevertheless in the conduct of its own affairs, without regard to the principles it represents, perpetrate upon its citizens wrongs which it would promptly condemn if practiced by one of them upon another." United States v. Chandler Dunbar Co. 152 Fed. Rep. 25, 41.

The advisability of making the elimination from the Alamo Forest was not a subject of conference between the United States and officers of the State of New Mexico. The interests of the State neither controlled, nor were referred to, in the making of the elimination. Nor were they affected by the elimination save to the extent that the interests of the entire country are served by the release from reservation of lands not needed for any of the purposes of a public reservation.

The decisions of the Land Department which we here complain against were, in our judgment, the offspring of confusion. The elimination of base lands from a forest

is not necessarily the release of a claim thereto by the United States. The Land Department, however, seems so to look at the matter. It seems to think that lands within National Forests which have been acquired by the United States from a State revert to the State upon their elimination from the forests. The right of the United States to a school section within a reservation attaches when a perfect selection of land in lieu of it has been made by a State; and that right of the United States is not affected because thereafter the Federal Government chose to transfer the base land from one class of land (reserved lands) to another class of lands (lands in the public domain).

In the case at bar the title to the base lands had passed to the State long before the forest was established and, therefore, the establishment of the forest had no effect thereon. If the establishment of the forest did not affect the State's title, then upon what theory can it be held that disestablishment of the forest affected an act done by the State in conveying away the title before disestablishment? If the elimination of lands from a public reservation can affect the power exercised by a State, or nullify an act done by it, in disposing of its lands, then, of course, an officer of the United States has power under the laws governing the elimination of lands from a forest reservation to vacate and cancel a State's deed of conveyance of its title to land within such reservation which was executed and delivered before the reservation was abolished.

The law relating to the control and administration of National Forests is in no measure or sense a part of the school land grant. National Forest legislation is distinctly separate and apart from and foreign to the school grant legislation. Why then allow changes in the boun-

daries of national forests to affect titles which have already vested? Boundaries of national forests are changed by act of the Executive (subject to certain statutory restrictions); but obviously executive acts can not be potent to alter or divest vested rights or titles. But that is what the decision in State of California, 44 L. D. 468, assumes to do.

Until the Department of the Interior can discover and publish something appearing in present day National Forest legislation that is expressive of the will of Congress that the elimination of a school section from a National Forest, subsequent to a perfect selection of land in lieu thereof, shall operate to invalidate such selection, or can demonstrate how the public interests of the United States are to be promoted by a ruling that because of such elimination the selection should not be approved, we will continue to believe that by the decision in 44 L. D. 468, the Department of the Interior has forced the United States into the unenviable position of a party to a valid contract who desires for no legal, equitable, moral or administrative reason to repudiate his solemn obligation thereunder.

Final analysis of the Land Department's position discloses this as the defense it is attempting here, viz, that there is a command to it issuing from Congress to reject State selections where the base lands are eliminated from the reservation subsequent to the making of the selection. The act or resolution of Congress carrying that command to the Secretary is not pointed out by that officer, who contents and defends himself by simply saying that it is his opinion that there is such a command. He attempts to state a reason for the opinion by declaring that elimination of the base land from the reservation enables the State to administer the base lands freed from any in-

convenience in the use thereof or any impairment in the value thereof caused by the reservation, and that therefore, and thereupon, the selection resting upon such base lands becomes invalid and must be rejected.

Further notice of the Land Department's stated justification of its action leads us to inquire whether there is any rule of statutory construction under which it can be seriously contended that statutes relating to the establishment and administration of forest reserves contain an implication that perfect lieu selections by a State are subject to avoidance by an act performed under the authority of those statutes. A power to avoid such a selection would be a power to work a forfeiture of a part of the grant to the State; and forfeitures by mere implication, even if an implication were discoverable in such statutes, are not favored. If an intent to avoid or forfeit a perfect selection by a State had been present in the mind of Congress when it enacted the forest reserve legislation in pursuance of which eliminations are made, such object would have been plainly and directly expressed therein.

X.

The Land Department's Ruling That the State Substitute Other and Different Base Land or Suffer Rejection of Its Perfect Selection was an Affront to the Dignity of the State and an Invasion of Its Rights Under Its Grant.

The suggestion that the State substitute other base to support the selection would be a suggestion that it acquiesce in the unlawful rejection, confess the legality, equity and justice of it and thus not only condone a seri-

ous wrong and injury, but actually encourage the infliction of the same injury in the future. It is not by compromise with the Land Department that the States must obtain the lands Congress has granted to them. It would be a compromise to follow a suggestion to substitute other base. The States have a right to demand performance by the Secretary of the Interior of his judicial duties in accordance with the mandate Congress has issued to him in the provisions of laws enacted for the benefits of the States, and that mandate requires that said officers refrain from the doing of anything so contrary to law and equity as what was done in the Land Department with respect to this appellant's perfect selection.

If the base land of the selection here under consideration became bad during the pendency of the selection, it was made bad through no act or omission of the State. If it became bad, an officer of the United States made it bad by exercise of a power delegated to him in some legislation having to do exclusively with National Forests. In other words, if the base became bad the voice of Congress, heard through and by an act thereof having nothing to do with the school grants, must have declared it bad. It could not get bad otherwise, as only Congress can authorize repudiation of the obligations of the United States. If there has been no repudiatory legislation by Congress then the selection here in question must be recognized as still valid.

Lands offered as bases for exchanges under the act of June 4, 1897 (30 Stat. 11, 34-6), do not become bad if, before approval of the offer to exchange, the base lands are eliminated from the National Forest. Of course, they do not. Common sense, to say nothing of legal right and equitable considerations, require that justice be done the citizen who selects under the act of 1897.

Do not the same things require that the same justice be done the States?

> "At the time of the filing of said selection and prior thereto the tracts embraced in the said deed of relinquishment and reconveyance, and in lieu of which the selection is made, were within the limits of the Olympic forest reserve in said State. Subsequently, on April 7, 1900, by proclamation of the President, that part of the forest reserve within which the said tracts are situated was restored to the public domain. No action has as yet been taken upon said selection."
>
> * * * * * *
>
> "By his deed of relinquishment and reconveyance to the United States of his own land situate within the boundaries of the forest reserve, and by his selection of the lieu land, McDonald accepted the standing offer or proposal of the government contained in the act of July 4, 1897, and complied with its conditions, thereby converting the mere offer or proposal of the government into a contract fully executed upon his part, and in the execution of which by the government he had a vested right. After McDonald had fully complied with the terms on which the government by said act had declared its willingness to be bound, no act of either the executive or legislative branch of the government could divest him of the right thereby acquired." Gideon F. McDonald, 30 L. D. 124, 125. See also Mary E. Coffin, 31 L. D. 175.

Lands claimed by settlers before survey in the field do not become bad bases for State selections if, before approval of the selections resting thereon, the settlers' entries are canceled or the settlements are abandond. Of course, they do not. No act of a settler can affect the rights of a State under its school grant after the right accrues and is exercised by and under a perfect selec-

tion. To hold otherwise would be to hold the States at the mercy of the will of individuals. Even the officer who rendered the decision of the Land Department in State of California, 44 L. D. 468, was of opinion at one time, that a base which is good when a selection is perfected can not be made bad thereafter by some act which was not performed by a State or the United States. He so declared on July 3, 1913, in Las Cruces, 05781, when he affirmed that it was in accordance with "the uniform rule of administration" that a good base could not be made a bad base by the act of an individual. That officer had probably forgotten the principle of this "uniform rule of administration" when he rendered his decision in 44 L. D. 468. The rule and the principle underlying it were stated in State of California (7 L. D. 270) to be as follows:

> "*By the act of selection the title of the State became vested in the tract so selected*, and all right to the basis was by said act completely divested, so that the title could not thereafter vest in the State, although the settler may have failed 'to make good his claim.'" (Italics are ours.)
>
> "But by the existence of a settlement on said tract at the date of survey, the State acquired the right to select other land in lieu of it, and having exercised this right by making selection of the land in controversy, *her title to said tract was then completed*, and by said act of selection she completely divested herself of all right thereafter to claim the part of section thirty-six used as the basis of said selection, whether McEvoy made good his claim or not." (Italics are ours.)

In Thomas F. Talbot (8 L. D. 495) it was said that the ruling in State of California (7 L. D. 270) was this—

> "that by the act of selection of lieu land the title of the State became vested in the tract so selected, and all right to the basis was by said act completely divested so that the title could not thereafter vest in the State although the settler may have failed to make good his claim." (See also State of South Dakota *v.* Thomas, 35 L. D. 171, 173.)

The State could not substitute new base with any assurance that the new base would bring to the State title to the selected land. It did not know when it prepared, filed and perfected the selection now under consideration, that the base it offered would be eliminated from the reservation before approval of the selection. New base, if now within a reservation, might also be eliminated therefrom before approval. Who now knows that it would not be? If the Department of the Interior could assure the State that new base, now within a reservation, would not be eliminated therefrom on the recommendation of the Department of Agriculture, or some other department, bureau or office of the government, before approval of the thus reformed selection, there would then be an inducement to furnish new base. But how could the State be assured against a possible continuous performance? If the Department of the Interior can give assurance that a new base will not be thrown off its base, it has the power to give that assurance before or at the time of the offering of the first base. The Land Department, however, has no authority for the giving of such assurances and should not, therefore, suggest to the State a course in the taking of which the State could not be fully protected by that Department. The States need no protection by one department against the acts of another. Congress has given the guaranty of the United States to the States that they will be treated honorably by

the United States. The nation gave that guaranty when it made the school grants. But the States will stand in sore need of re-affirmation of that guaranty by the enactment of further legislation, if there continues that uncertainty, instability and chaos with respect to selections which the Department of the Interior has produced by the decision in State of California (44 L. D. 468).

In a California State selection, known as Sacramento 02549, the original base was eliminated from the forest after perfection of the selection; and at the suggestion of the Land Department the State thereafter substituted other base in the forest. Before the substituted base reached the Secretary for his considration it was eliminated from the forest, whereupon the State was required to and it did make a second substitution of base. This illustrates the hide and seek, kaleidoscopic effect of the treatment accorded by the Land Department to such selections.

Unless there is a recall of the decision of the Land Department in appellee's case, or a reiteration by Congress that the school grants bind the honor and conscience of the nation, the States will suffer more in the future from that decision than they have in the past, as it is a certainty that the proverbial Anglo-Saxon attitude towards lands will bring about, and at no far distant date, more proclamations of exclusions from, than inclusions in, National Forests.

But it should not be presumed by the Department of the Interior that there is a plethora of school sections within reservations, either claimed by settlers or mineral in character from which a new base for the selection here in question could be supplied without detriment to the interests of the State. The contrary of that is the natural presumption, viz., that the States have not neglected tak-

ing the benefits of the school grant by stupidly failing to realize fully and promptly under the grant by immediately taking lieu lands for sections which they either can not wholly control or use advantageously. And even if there could easily be found within the State a school section in place owned by it (or one which will be owned by it on disestablishment of the reservation within which it is now included) and less valuable for school purposes than the section offered as base in support of the selection we are considering, should that suffice to warrant the Department of the Interior in formulating such a doctrine as is declared in 44 L. D. 468, or excuse or justify the State of New Mexico in submitting, without protest, to an assault upon its school grant which, if not resisted and overcome, will not only render the grant lacking in the elements of definiteness and certainty which Congress embodied therein with respect to exchanges but leave a sovereign State, when in the Department of the Interior, without the slightest protection from those principles of law and equity which may be invoked in any other tribunal in the country by the humblest citizen or foreigner who is a party to a contract arising out of an offer and acceptance.

XI.

It Would Be To Penalize the States for Delays In the Transaction of Public Business By the Land Department To Hold That the Elimination From the Forest Defeated the Selection.

The State's selection was filed with the Register and Receiver on March 9, 1915. On August 23, 1915, the General Land Office at Washington received proof of full

compliance with all statutory and Departmental requirements. If the selection had been acted on by the General Land Office on the latter date said office would have necessarily reported same to the Secretary for his approval. But it was not acted on then nor for nearly a year thereafter. The Land Department transacts an immense volume of business under the public land laws and does not find it possible at all times to transact such business with promptitude, *i. e.*, within a few weeks or few months subsequent to the claimant's becoming entitled to action by that Department on their perfected applications, filings, entries, locations, selections, etc. The delay is not due to lack of efficiency on the part of employees in the ancient system for administering the public lands. Congress has not always afforded the means for adequate clerical assistance. But the many ways the said Department is handicapped in administering justice under the law expeditiously and otherwise desirably need not be stated. The material fact here is that, as shown by the record, the particular perfect selection with which we deal here, to wit, the selection of the W½ of Section 29, Tp. 23 South, Range 38 East in lieu of the N½ of Section 36, Tp. 19 S., R. 14 E. was not acted on by any officer of the Land Department in Washington until May 16, 1916, when the appellant-Commissioner attempted rejection and cancellation thereof because, as he stated, the base land was eliminated from the forest reservation on April 3, 1916, more than a year after the making of the selection.

Do the States engage in a game of chance when they make lieu selections? Do they wager that they will get the selected land before the United States concludes to eliminate the base land from the reservation? Do they assume the risk of getting something which the United

States has promised before the latter changes its mind?

Because other public business having precedence over the perfect selection was not disposed of and gotten out of the way until after the section in place had been eliminated from the Forest Reserve, the Department of the Interior says that such selection must be rejected because the United States can plead thereto *non damnificatus*. An attempt by a party to a contract to justify his breach thereof upon the specious ground that the happening of events subsequent to his becoming obligated (which events may reasonably be supposed to have been in his contemplation at the time of entering into the contract) can not meet the approval of any court.

That a State selection can not be reached for adjudication in the regular course of the business before the Land Department until several months after it has been perfected was well known to the Land Department when the selection in question was made. It was also well known to the State; but the law imposes no such condition precedent to the validity of a State selection as that the State shall obtain an approval thereof before the base land is eliminated from the public reservation. Or, stated otherwise, the law imposes no such condition as that a State's right to lieu lands shall be determined with reference to conditions existing with respect to the base at time of submission of the selection to the Secretary of the Interior for action thereon by him. Not only are the terms and conditions of the contract between the United States and the States, under the School grants, to be ascertained with reference to the provisions of the laws making those grants, but the fairness of such contract, as in all contracts, is to be judged as of the date of the contract. Even at this time there exists no fact that would render approval of the selection unfair to the

United States in any respect. Notwithstanding this, the Land Department says, in effect, that the enjoyment by a State of a grant of lands made to it by Congress shall not be permitted to begin at the time the lands granted are pointed out, specified, designated and identified in the only manner prescribed by Congress to render the grant operative and effective, viz., by a selection of such lands, but that enjoyment of the grant shall be indefinitely postponed by conditions existing in the Land Department with respect to other and unrelated matters that render it impossible for that Department to reach and adjudicate the selection for a year, two years, three years, four years, or five years, or any number of years, after it has been made.

* * * "When the price is paid the right to a patent immediately arises. If not issued at once, it is because the magnitude of the business in the Land Department causes delay. But such delay, in the administration of affairs, does not diminish the rights flowing from the purchase, or cast any additional burdens on the purchaser, or expose him to the assaults of third parties." Benson Mining Co. v. Alta Mining Co., 145 U. S. 428, 431-2.

XII.

INEQUITABLE AND WHOLLY UNWARRANTED IN LAW WAS THE ACT OF THE APPELLANTS IN ATTEMPTING REJECTION AND CANCELLATION OF THE PERFECT SELECTION.

The tribunal in which the perfect selection made by New Mexico was rejected, did not decree its rejection upon terms of equity. It apparently accorded no con-

sideration whatever to the moneys expended and the time and effort given by the State in making the selection. It ordered rejection because, in its opinion, the United States had, by eliminating the base from the Alama Forest, expressed and effectuated a purpose of receding absolutely from the contract which arose when the selection was perfected. The hardship visited upon the State by the rejection was deemed neither entitled to consideration nor worthy of notice by the Land Department, notwithstanding said Department's power and duty to observe and apply the principles of equity in all public land matters. We can not bring ourselves to believe that the United States ever desires to do a wrong to any State or person that has, in good faith, fully complied with all the conditions of a law providing for the acquisition of title to the public lands; and we do not believe that there is anything in any law that permits officials of the Land Department to take such action as would effect repudiation of a governmental obligation.

If it be doubted that a serious wrong and injury are done to the States by the rule of decision in 44 L. D. 468, which the Land Department enforced against this appellee, the skeptic should trouble himself to learn what the various States have found it necessary to do in the matter of selections which have been rejected in accordance with that harsh and unnecessary rule. In honorable observance of obligation to persons who have contracted with the States for an interest in the selected lands, adjustments are being made to save such persons harmless by either refunding the initial payments they made to the States or, when possible, by substituting new bases if adverse claims have not intervened to place the selected lands forever beyond the reach of the States and such persons. The State of California (and

there may be other States) has been forced, as a consequence of that rule of decision, to enact remedial legislation on behalf of such persons. And all this wrong and injury results from a mistaken view of the meaning of the lieu provisions of the school grants that places the United States in an untenable position.

The Land Department's view of the situation presented by the elimination of base land from a national forest before approval of a due selection of land in lieu thereof, is this: That the exchange should not be consummated because the reason therefor has ceased to exist from the standpoint of but one of the parties. But that Department will concede that the exchange with which we are dealing here would and should have been consummated if taken up for action by the Secretary at any time within several months after the selection was made; and that the reason for the exchange continud to exist for a year after the selection was perfected. It must concede also, but it has given little or no consideration to the fact, that all the expenditures of money, time and effort made by the State in perfecting its selection must count for naught if the selection is not approved.

Let us inquire whether this view of justice taken by the Executive Department of the Government harmonizes with the view of justice taken by the Legislative and Judicial Departments in matters with which those latter Departments deal. It has never been the tendency of Congress when repealing a statute relating to the public lands, or to any other matter, to destroy all rights that accrued under conditions existing before the repeal, simply because the repeal caused the conditions to cease to exist thereafter. It has never been a tendency of the Judiciary when considering cases arising out of contract

between a grantor and grantee, to destroy all the rights of the grantee upon proof that while the reason for the grant existed when it was accepted by the grantee it ceased to exist thereafter owing to no act or omission on the part of the grantee. In both the Legislative and Judicial Departments of the government the marked tendency is to preserve and safeguard both citizens and the States against the effect of any changes in matters of government that are within the province of the Legislative and Judicial Departments. Those two Departments deem it promotive of justice in matters within their jurisdiction to determine the rights and obligations of citizens and States in the light of the circumstances and the law obtaining when the transactions creating the rights and obligations were entered into and made. Those two Departments believe that a contract arising out of acceptance of an offer should be enforced under the facts and law obtaining at the time of the acceptance. Those two Departments believe that a consideration for a contract or grant which is existing and valid when the contract or grant is made, and which was then taken and received by the grantor, can not be rendered invalid and non-existent by subsequent acts of the grantor for which the grantee is in nowise responsible.

But the Executive Department of the Government, represented by the Department of the Interior, has proclaimed that it is justice in the matter of school lieu selections to enforce this sort of doctrine, to wit: That while Congress both furnished a reason for an exchange and gave a right to the States to make an exchange, it was intended by Congress that the reason should be regarded as never having been furnished, and that the right should be regarded as never having been given if, after the reason has influenced the States to exercise the right to

select lieu lands, the condition that gave rise both to the reason and the right thereafter ceases to exist by some act of the United States. Doe has said to Roe that as the latter's lands are surrounded by lands owned by the former, the latter may convey his lands to the former and receive in consideration therefor an equal area of other lands belonging to the former. Roe accepts that proposition and executes, records and delivers to Doe a perfect deed of conveyance of title; and enters into contractual obligations with respect to the land Doe has engaged to transfer. Roe has also borne the expense of citing, by publication, all persons desiring to object to the contract to come in and be heard. Doe's lawyers are busy men and find it impracticable to examine Roe's deed, although it has been before them for a year or so. Before it has been examined, Doe informs his lawyers that he has made such a readjustment of his holdings that Roe's lands are no longer surrounded by lands owned by Doe and that, possibly, the land Roe has transferred is less valuable than the land Doe has contracted to give in consideration therefor. The lawyers, as the more zealous than conscientious servants of Doe, thereupon tell Roe that the reason for the exchange has ceased to exist and that Doe will not consummate it; and that he will not even as much as reimburse Roe to the extent of his expenses in the transaction. If Roe has the spirit of a beggar he will submit to the injustice.

If the condition that both gives rise to the reason for an exchange and confers a right to have it made, must exist at time of approval of a clear list *as an indispensable condition precedent to its approval,* then it devolves upon the Land Department to prove the statute having to do with National Forests that contains provisions expressive of an intention entertained by Congress that an

act performed thereunder shall (a) invalidate acts done by a State under its school grant; shall (b) detach the grant from lands after it has attached thereto; shall (c) divest the United States of the title to base land acquired under a selection valid and perfect when made; shall (d) revest the title to such base land in the State, and (e) make the United States play the role of Doe and the State the role of Roe in the illustration of unconscionable conduct given hereinbefore.

Conclusion.

We cannot close without calling attention to the tremendous power exercised by executive tribunals. Such power, so exercised, and not always divorced from executive considerations, should be confined within the narrowest limits, and all encroachments on the constitutional rights of the citizen or a State should be jealously restrained by the Courts.

As said by Mr. Justice Bradley:

> "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely: by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen and against any stealthy encroachments thereon. Their motto should be *obsta principiis*" Boyd *v.* United States, 116 U. S., 616, 635.

> "The securities of individual rights, it has often been observed, cannot be too frequently declared, nor in too many forms of words; nor is it possible to guard too vigilantly against the encroachment of power, nor to watch with too lively a suspicion the propensity of persons in authority to break through the 'cobweb chains of paper constitutions.'" Judge Cooley, in Story on the Constitution, fifth ed., sec. 1938.

The ruling of the Land Department with respect to New Mexico's perfect lieu selection is wholly unwarranted by any law, unsupported by any judicial decision, contrary to equity, unconscionable and without even the mitigating circumstance of being conducive to Departmental convenience in the administration of the public land laws.

It is submitted that the concurring opinions below express the only possible conclusion of the judiciary consistent with justice under the law in the United States and should, therefore, be sustained and affirmed.

Respectfully,

PATRICK H. LOUGHRAN,
Mills Building,
Washington, D. C.
Attorney for The State of New Mexico, Appellee.

SUPREME COURT OF THE UNITED STATES.

No. 128.—October Term, 1920.

John Barton Payne, Secretary of the Interior, et al., Appellants, *vs.* The State of New Mexico. } Appeal from the Court of Appeals of the District of Columbia.

[March 7, 1921.]

Mr. Justice Van Devanter delivered the opinion of the Court.

This is a suit by the State of New Mexico to enjoin the Secretary of the Interior and the Commissioner of the General Land Office from canceling or annulling a lieu land selection of that State under a mistaken conception of their power and duty. A hearing on the bill and answer resulted in a decree for the State, which the Court of Appeals affirmed, 258 Fed. 980, and the defendants appealed to this court.

There was no controversy or difference in the land department about any question of fact, but only in respect of the time as of which the officers were authorized and required to determine the validity of the selection.

Congress granted to New Mexico for the support of common schools designated sections of land in each township, subject to specified exceptions, with a provision enabling and entitling the State to select other lands in lieu of those excepted, and with a further provision whereby, in the event any of the designated sections after passing under the grant should be included within a public reservation, the State was to be entitled to waive its right to them and select instead other land of equal acreage. See *California* v. *Deseret Water, etc. Co.*, 243 U. S. 415. All lieu lands were to be selected "under the direction and subject to the approval of the Secretary of the Interior." Acts of June 21, 1898, c. 489, §§ 1, 8, 30 Stat. 484; March 16, 1908, c. 88, 35 Stat. 44; June 20, 1910, c. 310, §§ 6, 10-12, 36 Stat. 557; February 28, 1891, c. 384, 26 Stat. 796, amending §§ 2275, 2276 Rev. Stat.

Some of the tracts in place after passing under the grant were included within a public reservation called the Alamo National Forest. Afterwards, on March 9, 1915, the State filed in the local land office a selection list waving its right to one of these tracts and selecting in its stead other land of like area lawfully subject to selection. The list conformed to the directions given by the Secretary of the Interior and was accompanied by the requisite proofs and the proper fees. Notice of the selection was duly posted and published, proof of publication was submitted and the publisher's charge was paid. In other words, the waiver and selection were regularly presented and all was done by the State that needed to be done by it to perfect the selection. The notice did not bring forth any protest or objection, and in due course the local land officers forwarded the list and supporting proofs and papers to the General Land Office with a certificate stating that there was no adverse filing, entry or claim to the land selected and that the list had been accepted and approved by them. The list remained pending in that office until May 16, 1916, when the Commissioner directed that the selection be canceled solely on the ground that in the meantime, on April 3, 1916, the base tract—the one the right to which was waived—had been eliminated from the reservation by a change in its boundaries. The State appealed to the Secretary of the Interior and he affirmed the Commissioner's action. Both officers proceeded on the theory that the validity of the selection was to be tested by the conditions existing when they came to examine it and not by those existing when the State made it—in other words, they conceived that although the selection was lawful when made they could and should disapprove it and direct its cancelation by reason of the elimination of the base tract from the reservation a year later.

The courts below rejected that view and held that those officers were required to give effect to the conditions existing when the selection was made and that, if it was valid then, they were not at liberty to disapprove or cancel it by reason of the subsequent change in the status of the base tract. In our opinion the courts were right. The provision under which the selection was made was one inviting and proposing an exchange of lands. By it Congress said in substance to the State: If you will waive or surrender your titled tract in the reservation, you may select and take in lieu of it a tract of like area from the unappropriated non-mineral

public lands outside the reservation. Acceptance of such a proposal and compliance with its terms confer a vested right in the selected land which the land officers cannot lawfully cancel or disregard. In this respect the provision under which the State proceeded does not differ from other land laws which offer a conveyance of the title to those who accept and fully comply with their terms.

In the brief for the officers it is frankly and rightly conceded to be well settled that "a claimant to public land who has done all that is required under the law to perfect his claim acquires rights against the Government and that his right to a legal title is to be determined as of that time"; and also that this rule "is based upon the theory that by virtue of his compliance with the requirements he has an equitable title to the land; that in equity it is his and the Government holds it in trust for him." See *Lytle* v. *Arkansas*, 9 How. 314, 333; *Stark* v. *Starrs*, 6 Wall. 402, 417-418; *Ard* v. *Brandon*, 156 U. S. 537, 543; *Payne* v. *Central Pacific Ry. Co.*, *ante*, p.—. But it is said that as the selection is "subject to the approval of the Secretary of the Interior" no right can become vested, nor equitable title be acquired, thereunder unless and until his approval is had, and therefore that the rule just stated is not applicable here. To this we cannot assent. The words relied upon are not peculiar to this land grant, but are found in many others. Their purpose is to cast upon the Secretary the duty of ascertaining whether the selector is acting within the law, in respect of both the land relinquished and the land selected, and of approving or rejecting the selection accordingly. The power conferred is "judicial in its nature" and not only involves the authority but implies the duty "to determine the lawfulness of the selections as of the time when the exertion of the authority was invoked by the lawful filing of the list of selections." *Weyerhaeuser* v. *Hoyt*, 219 U. S. 380, 388; *Daniels* v. *Wagner*, 237 U. S. 547, 557, *et seq.*; *Payne* v. *Central Pacific Ry. Co.*, *supra*. This view of it has been enforced where the Secretary, misconceiving his authority and the rights of the selector, erroneously declined to approve and canceled selections lawfully made. *St. Paul & Sioux City R. R. Co.* v. *Winona & St. Peter R. R. Co.*, 112 U. S. 720; *Daniels* v. *Wagner*, *supra*. And it should be observed that this view has been recognized and applied by the land department, although not with uniformity. In the case of *Gideon F. McDonald*, 30 L. D. 124, which involved a lieu land

selection and a state of facts much like those now before us, it was said by the Secretary of the Interior: "When the selection was filed the land embraced in the accompanying deed of relinquishment and reconveyance was within the limits of the forest reserve and a proper basis for a selection under said act, and the land selected by McDonald in exchange was, according to the records of your [Commissioner's] office, of the character subject to such selection and free from other claim or appropriation. By this deed of relinquishment and reconveyance to the United States of his own land situate within the boundaries of the forest reserve, and by his selection of the lieu land, McDonald accepted the standing offer or proposal of the government contained in the act of June 4, 1897, and complied with its conditions, thereby converting the mere offer or proposal of the government into a contract fully executed upon his part, and in the execution of which by the government he had a vested right. After McDonald had fully complied with the terms on which the government by said act had declared its willingness to be bound, no act of either the executive or legislative branch of the government could divest him of the right thereby acquired. Your [Commissioner's] office will therefore carefully examine the papers and records pertaining to this selection and, if it is found to be otherwise free from objection, the fact of the elimination from the boundaries of the forest reserve of the lands in lieu of which the selection is made, after full compliance by the claimant with the lieu land act and regulations, will not prevent approval of the selection."

In *California* v. *Deseret Water, etc. Co., supra*, which involved a like waiver and selection alleged to have been lawfully made and to be awaiting action by the Secretary, the United States, in a brief presented by leave of the court, took the position that by the waiver the base tract was taken without the condemnation law of the State. The state court had held the waiver and selection of no effect and this court reversed that decision.

We conclude that an injunction was rightly awarded, but that it will be better suited to the occasion if it be confined to directing a disposal of the selection in regular course unaffected by the elimination of the base tract from the reservation. With this modification the decree is

Affirmed.